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7

8 UNITED STATES BANKRUPTCY COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SANTA ROSA DIVISION
11

12 IN RE:

13 SOLSTICE, LLC, et al.,

14 Debtors,

[S.D.N.Y Bankr. Case No. 09-11010 (REG)]

Chapter 11 (Jointly Administered)

Adversary Proceeding No.

15
16 SOLSTICE, LLC,

17 Plaintiff,

18 vs.

19 GRAHAM KOS; TIM WOLFF; TIM
20 WELLER; CHAD MORSE; JAMES KIME;
SHAY LLC; BEALE LLC; WINSTON &
21 STRAWN LLP; JONATHAN COHEN;
NOVOGRADAC & COMPANY LLP; JON
22 KRABBENSCHMIDT; SHAY KOS; and
DOES 1 through 400,

23 Defendants.
24

25 NOTICE OF REMOVAL PURSUANT TO 28 U.S.C. SECTION 1452
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1 **NOTICE OF REMOVAL PURSUANT TO 28 U.S.C. SECTION 1452**

2 PLEASE TAKE NOTICE that Defendant Novogradac & Company, LLP
3 (“Novogradac”) and Jon Krabbenschmidt (“Krabbenschmidt”) (collectively “Removing
4 Defendants”) hereby remove the Third Cause of Action in the above-entitled action (the
5 “Action”) from the Superior Court of the State of California, County of Marin (the “State
6 Court”), to the United States Bankruptcy Court for the Northern District of California, Santa
7 Rosa Division, pursuant to 28 U.S.C. §1452(a) and Federal Rule of Bankruptcy Procedure
8 (“FRBP”) 9027. In support of such removal, Removing Defendants allege as follows:

9 1. On March 5, 2009, plaintiff Solstice, LLC (“Plaintiff” or “Solstice”) and certain
10 of its affiliates (collectively, the “Debtors”), commenced Chapter 11 bankruptcy cases under
11 Title 11 of the United States Code, 11 U.S.C. §101 et seq. (the “Bankruptcy Code”) by filing
12 Voluntary Petitions in the United States Bankruptcy Court for the Southern District of New
13 York, jointly administered under Case No. 09-110010 (REG) (the “Bankruptcy Case”). A true
14 and correct copy of Solstice’s Voluntary Petition is attached hereto as Exhibit 1. Pursuant to 11
15 U.S.C. §301(b), the filing of such Voluntary Petition constitutes an order for relief under
16 Chapter 11 of the Bankruptcy Code.

17 2. On May 28, 2009, Removing Defendant Novogradac filed a Proof of Claim in the
18 Debtors Bankruptcy Case in the amount of \$39,889.17 (the “Bankruptcy Claim”) based on legal
19 services that Novogradac provided to the Debtors (including work performed by Removing
20 Defendant Krabbenschmidt), as reflected by invoices dated August 15, 2008 through March 15,
21 2009, as referenced in the Bankruptcy Claim. A true and correct copy of the Bankruptcy Claim
22 is attached hereto as Exhibit 2.

23 3. Plaintiff and the other Debtors apparently dispute Novogradac’s Bankruptcy
24 Claim based on their listing a debt in the amount of \$39,137.37 to Novogradac as “DISPUTED”
25 in Schedule F (Creditors Holding Unsecured Nonpriority Claims) filed in the Bankruptcy Case
26 on May 18, 2009. True and correct copies of relevant pages of the Schedules filed in the
27 Bankruptcy Case are attached hereto as Exhibit 3.

28 4. On November 12, 2009, the Action was filed in the State Court, designated as Case

No. CIV 095755. Service upon removing defendants Novogradac and Krabbenschmidt was attempted on November 25, 2009. True and correct copies of the pleadings and process filed in the Action and provided to Removing Defendants to date are attached hereto as Exhibit 4.

5. This Notice is filed within the time allowed for the removal of civil actions pursuant to FRBP 9027(a)(3). Based on Removing Defendants' receipt of the Summons and Complaint in the Action on November 25, 2009, assuming service was effective on that date, the deadline for Removing Defendants to file this notice of removal is December 28, 2009 pursuant to FRBP 9027(a)(3) and 9006(a)(1).

6. The District Court (and the Bankruptcy Court which is a unit of that District Court) have original jurisdiction over the Third Cause of Action in the Action pursuant to U.S.C. §1334(b) in that the Action is a proceeding "... arising in or related to ..." a case under the Bankruptcy Code (the Bankruptcy Case), which is currently pending in the Southern District of New York Bankruptcy Court.¹ The Third Cause of Action purports to allege "Accountant Malpractice" claims against Removing Defendants with respect to accounting services provided by Removing Defendants to the Debtors, which accounting services are the very basis of the Bankruptcy Claim filed by Removing Defendant Novogradac in the Bankruptcy Case (which includes services performed by Removing Defendant Krabbenschmidt). Specifically, the Third Cause of Action in the Action, as to which Removing Defendants are the only named defendants, is entitled "Accountant Malpractice", and alleges, among other things, that Removing Defendants charged Debtor Solstice "excessive amounts for accounting services". Exh. 4, p. 7, ¶28.

7. The Third Cause of Action is removable to this Court pursuant to 28 U.S.C. 1452(a)² in that it is a civil action (other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's policy or regulatory power) which is pending in a court that is located in the District of this Court, and, as discussed

¹ Section 1334(b) provides, in relevant part: "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to a case under title 11". 28 U.S.C. §1334(b).
² Section 1452 provides in relevant part: "A party may remove any claim or cause of action in a civil action ... to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title." 28 U.S.C. §1452(a).

1 above, there is original District Court jurisdiction pursuant to 11 U.S.C. §1334(b).³

2 8. The Action is a “core proceeding” within the meaning of 28 U.S. C. §157(b), as it
3 falls within each of the following categories (any one of which is sufficient to constitute a core
4 proceeding):

5 “matters concerning the administration of the estate” (28 U.S.C. §157(b)(2)(A));

6 “allowance or disallowance of claims against the estate . . .” (28 U.S.C.
7 §157(b)(2)(B));

8 “counterclaims by the estate against persons filing claims against the estate” (28
9 U.S.C. §157(b)(2)(C)); and

10 “other proceedings affecting the liquidation of the assets of the estate or the
11 adjustment of the debtor-creditor or the equity security holder relationship . . .”
(28 U.S.C. §157(b)(2)(O)).

12 9. Alternatively, the Action is, at minimum, “related” to the Bankruptcy Case within
13 the meaning of 28 U.S.C. §1334(b) because **“the outcome of the proceeding could conceivably**
14 **have an[] effect on the estate being administered in bankruptcy.”** *In re Fietz*, 852 F.2d 455,
15 457 (9th Cir. 1988) (emphasis in original) (internal quotations and citation omitted); *accord*
16 *McGuire v. United States*, 550 F.3d 903, 912 (9th Cir. 2008). The outcome of the Third Cause of
17 Action will at least conceivably (if not almost certainly) have an effect on the estate being
18 administered in the Debtors’ Bankruptcy Case. If the Plaintiff successfully recovers damages
19 with respect to the Third Cause of Action, then this will presumably increase the assets available
20 for distribution in the Bankruptcy Case. Moreover, the Third Cause of Action is tantamount to
21 an objection by Plaintiff to Novogradac’s Bankruptcy Claim and/or a counterclaim with respect
22 thereto, as it alleges malpractice against the Removing Defendants with respect to the same legal
23 services that are the basis of the Bankruptcy Claim. Indeed, while styled as a claim for
24 accountant malpractice, the Third Cause of Action goes further and alleges that Removing
25 Defendants charged “excessive amounts for accounting services”. Consequently, adjudication of
26 the Third Cause of Action will necessarily implicate the allowance of the Bankruptcy Claim in
27 the Debtors’ Bankruptcy Case, thereby directly affecting the administration of the Bankruptcy

28 ³ By separate motion, Removing Defendants intend to request this Court to transfer the removed Third Cause of
Action to the Southern District of New York where Plaintiff’s bankruptcy case is pending, pursuant to 28 U.S.C.
1412.

1 Case.

2 10. Removing Defendants certify that a copy of this Notice will be promptly filed
3 with the Clerk of the State Court and served on all parties to the Action pursuant to FRBP
4 9027(b) and (c).

5 Respectfully submitted,

6 Dated: December 22, 2009

LONG & LEVIT LLP

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8 By 

9 HOWARD M. GARFIELD
10 DAVID P. BOROVSKY
11 Attorneys for Defendants
12 NOVOGRADAC & COMPANY, LLP
13 and JON KRABBENSCHMIDT

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